

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DARRYL PHELPS,

Petitioner,

-against-

K. MCCARTHY, SUPERINTENDENT,

Respondent.

24-CV-2381 (LTS)

ORDER

LAURA TAYLOR SWAIN, Chief United States District Judge:

By order dated May 28, 2024, the Court denied without prejudice the petition filed in this action under 28 U.S.C. § 2254, because Petitioner’s challenge to his March 1, 2023 conviction was premature.<sup>1</sup> The Court based its finding on Petitioner’s admission that his appeal is currently pending in the New York Supreme Court, Appellate Division. (*See* ECF 1, at 5 (“Appeal is still pending[.]”).) After the Court dismissed this action, Petitioner filed several documents seeking release from his current custody in the Elmira Correctional Facility.

As the Court discussed in its May 28, 2024 order, any challenge to Petitioner’s current custody is premature because Petitioner has not exhausted his state court remedies by (1) perfecting his appeal in the Appellate Division and (2) seeking leave to appeal from an adverse decision by the Appellate Division. Petitioner may proceed in federal court only *after* he exhausts these state court remedies.

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<sup>1</sup> Petitioner refers to his parole proceedings in many of his submissions. According to public records maintained by the New York State Department of Corrections and Community Supervision (“DOCCS”), Petitioner was on parole at the time he committed his new crimes of predatory sexual assault and first-degree sexual abuse. *See DOCCS, Inmate Locator, Darryl Phelps*, <https://nysdoccslookup.doccs.ny.gov> [https://perma.cc/57R7-9PHB]. Also according to DOCCS’ records, Petitioner’s current custody is based on his new conviction, rendered on March 1, 2023.

### CONCLUSION

Accordingly, the Court denies the relief Petitioner seeks in ECF 18-26.

This action is closed. Should Petitioner continue to file submissions challenging his conviction, before exhausting his state court remedies, the Court will not address such submissions in a future order.

Because the petition makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. *See* [28 U.S.C. § 2253](#).

The Court certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

SO ORDERED.

Dated: August 5, 2024  
New York, New York

/s/ Laura Taylor Swain

LAURA TAYLOR SWAIN  
Chief United States District Judge